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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 223

RAILWAY EXPRESS AGENCY, INCORPORATED,
Petitioner,

vs.

WILLIAM J. KENNEDY, ET AL.,
Respondents.

REPLY BRIEF.

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CITATIONS.

Cases.

	PAGE
Crampton v. Zabriskie, 101 U. S. 601 (1879)	6
Gange Lumber Co. v. Rowley, 326 U. S. 295 (1945)	5
Stark v. Wickard, 321 U. S. 288 (1944)	4
United States v. Interstate Commerce Commission, 337 U. S. 426 (1949)	2
Wong Yang Sung v. McGrath, 339 U. S. 33 (1950)	3

Statutes.

Administrative Procedure Act, 5 U. S. C. § 1001 et seq.: Sec. 2(a)(1), 5 U. S. C. § 1001(a)	2, 3
Railroad Retirement Act, 45 U. S. C. § 228a et seq.: Sec. 10, 45 U. S. C. § 228j	3
Railroad Unemployment Insurance Act, 45 U. S. C. § 351 et seq.: Sec. 5, 45 U. S. C. § 355	4, 5
Railway Labor Act, 45 U. S. C. § 151 et seq.: Sec. 3, 45 U. S. C. § 153	3

Miscellaneous.

S. Rep. No. 752, 79th Cong. 1st Sess.	3
S. Doc. No. 248, 79th Cong. 2nd Sess.	3
Davis, Standing to Challenge and to Enforce Administrative Action, 49 Col. L. Rev. 759	5

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REPLY BRIEF.

The brief of the Solicitor General in behalf of two of the three members of the Railroad Retirement Board opposing the petition for certiorari merely serves to indicate the inherent difficulties of the position which a majority of the Board has taken. However, in order that there may be no misunderstanding of the implications of that position, we feel it appropriate to make a few very brief observations with respect to the Solicitor General's brief.

First, by failing to defend the legality of the Board's determination that the strike of petitioner's employees was not commenced in violation of the Railway Labor Act, respondents take the unequivocal position that, however flagrant the Board's violation of the statutory restrictions on the payment of compensation, the carriers who must pay every penny of the money distributed by the Board cannot be heard in any forum to complain of its largess. Since

the recipients of benefits would be neither inclined nor entitled to complain, the necessary effect of respondents' position (and of the decision of the Court of Appeals), therefore, is that there is absolutely no method by which the Board may be kept within the limits prescribed by statute for the distribution of unemployment compensation. Such a result is wholly unreconcilable with this Court's statement in *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, 433-4 (1949), that the contention that a final administrative order is "not reviewable by any court even though entered arbitrarily, without substantial supporting evidence, and in defiance of law" is "out of harmony with the general legislative pattern of administrative and judicial relationships." Since the Solicitor General has failed to rationalize these apparently divergent views, we can only assume that he too recognizes the conflict.

Second, respondents' discussion of the Administrative Procedure Act (Resp. 9-10) not only assumes the answer to a close and undecided question of law but misses the point entirely with respect to the effect of the Act upon the right to judicial review of agency decisions. The question whether under section 2(a)(1) of the Administrative Procedure Act, 5 U. S. C. § 1001(a), the Railroad Retirement Board is exempt from all but the publicity requirements of the Act as an agency "composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them" has not been decided by the courts. Without attempting at this time to argue the question at length, it may be pointed out that even if it is assumed that the Board is composed of representatives of carriers and employees,[1] respondents

[1] The Railroad Retirement Board differs from such agencies as the National Railroad Adjustment Board, which Congress had particularly in mind in enacting section 2(a)(1) of the Administrative Procedure Act, in several important respects: (1) Only two

in this very case take the position (Resp. 4) that carriers are *not* proper parties to a dispute before the Board. Furthermore, while the House Committee Report lists the Railroad Retirement Board as one of the agencies exempted from the statute by the provision quoted, the Senate Report (S. Rep. No. 752, 79th Cong. 1st Sess.) does not, and Senator McCarran, chairman of the Senate Judiciary Committee, stated on the Senate floor that "*various functions* of such agencies as the Railroad Retirement Board are excluded from the provisions of the Act by the applicable language of *later sections.*" Sen. Doc. No. 248, 79th Cong. 2d Sess. p. 307. (Emphasis supplied.) In his view, obviously, the Board was not exempted by the language of section 2(a)(1). As this Court recently noted with respect to this Act, "The legislative history is more confusing than the text is ambiguous." *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, 49 (1950).

However, assuming that the Board is an agency exempted from theAdministrative Procedure Act by section 2(a)(1), it does not follow, as the Solicitor General argues, that the "obvious purpose" of such exemption was to restrict judicial review of orders of the Board within narrower compass than orders of agencies covered by the Act. That inference is wholly without basis for the reasons (1) that the exemption provision was inserted not because of the judicial review provisions of the Act but because the exempted agencies "do not lend themselves to the *adjudicative procedures* set out in the remaining sections of the bill" (S. Rep. No. 752, 79th Cong. 1st Sess.); and (2) that the judicial

of the three members of the Railroad Retirement Board are selected as representatives of employees and carriers respectively. The third member, by express statutory provision, "shall not be in the employment of or be pecuniarily or otherwise interested in any employer or organization of employees." 45 U. S. C. § 228j. (2) The members of the Railroad Retirement Board are appointed by the President, rather than by direct selection of the interested groups. Compare 45 U. S. C. § 228j with 45 U. S. C. §153.

review provisions were not intended to change but to define and codify the preexisting right to judicial review of agency action as stated in such decisions as *Stark* v. *Wickard,* 321 U. S. 288 (1944).

Third, the Solicitor General's treatment of the statutory provision which is claimed to preclude judicial review (Resp. 7-9) merely emphasizes the substantiality of petitioner's position, since he has found it advisable (1) to abandon the principal argument made by the General Counsel of the Board in the Court of Appeals, that the concluding paragraph of section 5(c) of the Railroad Unemployment Insurance Act precludes judicial review, and to rely entirely upon section 5(g) of the Act, 45 U. S. C. § 355(g); and (2) to rewrite the latter subsection. Subsection 5(g) is not divided into three separately numbered classes of determinations, as is implied at page 8 of respondents' brief. Instead that subsection grants finality only to "Findings of fact and conclusions of law of the Board in the determination of any claim for benefits or refund, the determination of *any other matter* pursuant to subsection (c) of this section, and the determination of the Board that the unexpended funds in the account are available for the payment of any claim for benefits or refund under this Act." (Emphasis supplied.)[2]

This language simply provides that when the Board makes findings of facts and conclusions of law in determinations of claims for benefits or any other matter pursuant to the procedure outlined in subsection (c)—which concededly was not done in this case—such findings and

[2] Petitioner has not abandoned the supporting argument that there are no findings of fact or conclusions of law made by the Board in a case of this character, as claimed in footnote 4, page 9 of respondents' brief. It is, of course, unnecessary to advance every available argument on the merits in a petition for certiorari, and as we shall show if the petition is granted, no findings of fact or conclusions of law of the Board are made in cases of this kind.

conclusions are final unless a statutory appeal is taken as provided in subsection (f). And, consistently, such statutory appeals can only be taken from determinations made under the procedures set out in subsection (c). Reduced to its substance, the Solicitor General is arguing that because the statute specifically requires employees to comply with the administrative and judicial review procedures set out in section 5(c) and (f), it must follow that carriers are thereby precluded from obtaining any review whatever of unlawful agency action depleting the trust fund which they must, by law, replenish.[3]

Fourth, with respect to respondents' treatment of *Gange Lumber Co.* v. *Rowley*, 326 U. S. 295 (1945), we agree that there was no discussion in that case of the question whether "the considerations governing justiciability, therein applied to constitutional issues, are not equally applicable to nonconstitutional issues" (Resp. 11), for the very good reason that there was no occasion for such a discussion, which would have been dictum, pure and simple. What is significant is that the Court carefully left that question open by confining its holding to questions "concerning the state's power" under the Fourteenth Amendment (326 U. S. at 305), thereby leading a student of the subject[4] to the conclusion that this Court would draw just such a distinction. It should be emphasized that the *Gange* case did not involve allegedly unlawful administrative action but a contention that mere extension by legislative action of the time within which employees could reopen their claims

[3] The third "class" of findings of fact and conclusions of law of the Board made final by section 5(g), that unexpended funds are available for the payment of claims for benefits, is obviously inapplicable, since it relates not to the decision of the validity of specific claims but to whether funds are available in the Account for their payment. No carrier could have any interest in challenging that determination if the claim itself was valid.

[4] Davis, *Standing to Challenge and to Enforce Administrative Action*, 49 Col. L. Rev. 759, 788 (1944).

for compensation on the ground of aggravation of injury, which could have been reopened by the agency in any event, deprived the employer of its property without due process of law, a contention which Mr. Justice Black dismissed as frivolous.

Finally, the fact that it is impossible to determine exactly what effect the unlawful payments will have upon petitioner's rate of contribution seems clearly beside the point. Petitioner has a justiciable interest sufficient to challenge the Board's action because it is one of a very small group whose members must inevitably pay any amounts unlawfully disbursed by the Board, and whose rate of contribution depends directly upon the amount remaining in the fund. To say that "there is no more than a bare possibility of injury in the future," as does the Solicitor General, is to ignore the fact that every penny unlawfully distributed by the Board will eventually have to be made up by a small group of taxpayers, of whom petitioner is one. Certainly, its interest is more direct and immediate than that of a municipal taxpayer, whose standing to sue was upheld by this Court in *Crampton* v. *Zabriskie,* 101 U. S. 601, 609 (1879), even apart from the sliding-scale contribution rate feature of the Act. The statement of the Solicitor General to the contrary (Resp. 13) is not and cannot be supported.

Conclusion.

The brief submitted in behalf of respondents Kennedy and Harper, we submit, confirms the importance of a further hearing upon certiorari. We therefore respectfully renew our request that the petition be granted.

Respectfully submitted,

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